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The EU Charter of Fundamental Rights and Working Time: *Bauer, Kreuziger and Shimizu* before the Grand Chamber

Introduction

The few words ‘paid annual leave’ in Article 7 of the working time Directive¹ have given rise to many difficult legal issues. While the original Directive² was enacted as a health and safety measure under then Article 118a of the EU Treaty (now Article 153 of the Treaty on the Functioning of the European Union), from an early stage the right to paid annual leave was conceived as a fundamental social right. The process began with the opinion of Advocate General Tizzano in *BECTU*, who attributed the source of Article 7 to various human rights instruments, including the Universal Declaration of Human Rights, the European Social Charter, and the UN Charter of 1966 on economic, social and cultural rights.³ While the Court (CJEU) has been more restrained in its sources, it has often had regard to the principles of the ILO, which are expressly referred to in the recitals to the Directive. For example, ILO Convention No. 132, Holidays with Pay (Revised), has been influential in relation to matters such as the holiday entitlement of sick workers⁴ and the requirement that ‘normal remuneration’ is maintained in respect of ~~the~~ annual leave.⁵

Three Grand Chamber judgments all delivered on the same day now add to the burgeoning CJEU case-law on the meaning and effect of this fundamental social right: *Max-Planck v Shimizu*,⁶ *Kreuziger v Land Berlin*⁷ and *Stadt Wuppertal v Bauer*.⁸ Quite apart from the important substantive issues at stake, the judgments in *Shimizu* and *Bauer* are relevant to a wider issue. Foremost among the human rights instruments referred to by AG Tizzano in *BECTU* was Article 31(2) of the EU Charter of Fundamental Rights (the ‘Charter’), which gives ‘every worker’ the right, among other matters, to limits on maximum working hours, to daily and weekly rest periods and to an annual period of paid annual leave. However, in subsequent cases on working time the Charter only figured as a passing reference in the CJEU’s mantra that the right to paid annual leave was ‘expressly laid down in Article 31(2)

¹ Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

² Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.

³ Opinion of AG Tizzano, §§23-28, in *Regina (BECTU) v Secretary of State for Trade and Industry*, C-173/99, 8 February 2001.

⁴ See, for example, CJEU (Grand Chamber) in *Shultz-Hoff v Deutsche Rentenversicherung Bund; Stringer v Her Majesty’s Revenue and Customs*, joined cases C-350/06 and C-520-06, 20 January 2009, §§37-38 and in *KHS AG v Winfried Schulte*, Case C-214/10, 22 November 2011, §§41-42.

⁵ See Article 7 of the ILO Convention and e.g. CJEU (First Chamber), *British Airways v Williams*, C-155/10, 15 September 2011, §§19-21 (see too AG Trstenjak §50).

⁶ CJEU (Grand Chamber), *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, C-648-16, 6 November 2018.

⁷ CJEU (Grand Chamber), *Kreuziger v Land Berlin*, C-619/16, 6 November 2018.

⁸ CJEU (Grand Chamber), *Stadt Wuppertal v Bauer; Willmeroth v Broßon*, Joined cases C-596/16, C-570/16, 6 November 2018.

of the Charter'.⁹ When, in *Dominguez*, AG Trstenjak opined at considerable length that the right to paid annual leave in Article 31 enshrined a fundamental right but lacked horizontal effect between private individuals, the Grand Chamber ignored the issue altogether, referring instead to the conventional tools of vertical direct effect and harmonious interpretation of the Directive domestic law.¹⁰ This was taken as a sign of the Charter's impotence.¹¹

That has all now changed as a result of *Shimizu* and *Bauer*, in which the Grand Chamber finally addressed the interrelationship between the Directive, international human rights instruments and Article 31 of the Charter. Signalling a new direction in the enforcement of social rights in the Charter, the judgments are relevant to other social provisions in the 'solidarity' Chapter of the Charter and highlight a new direction in the means of giving effect to EU social law.

Analysis of decisions

In both *Kreuziger* and *Shimizu* the CJEU clarified the circumstances in which a worker could lose the right to paid annual leave (or a payment in lieu on termination of employment) under national law because he had the opportunity to take leave but did not do so, an issue already foreshadowed in *Schultz-Hoff*.¹² Using almost identical language in both cases, the Court focussed on the need for an actual opportunity to take leave, sensitive to the worker's weak position in the employment relationship, the risk of incentives or encouragement not to take leave and the importance of effective enforcement of the mandatory duties in the Directive.¹³ In that light, the right could not lapse simply because a worker did not apply to take annual leave in the relevant year. Rather, the employer bore the burden of demonstrating that the worker was properly encouraged to take leave but, in full knowledge of the legal consequences, deliberately chose not to exercise the opportunity.¹⁴ National legislation which provided for the automatic loss of the right was, therefore, incompatible with the Directive.

In *Bauer*, the CJEU faced applications by two widows for the payment of allowances in lieu of holiday not taken by their former husbands when the husbands' employment terminated by reason of death. The Court held that a worker's death did not entail the loss of the right to annual leave or the linked right to a payment in lieu, the compensation for which passed to his estate.¹⁵ The reason, according to the CJEU, is that the loss of the right would undermine its 'very substance' and would

⁹ See, among many others, *British Airways v Williams* §18; CJEU (Tenth Chamber), *Sobczyk v Szkoła Podstawowa*, C-178/15, 30 June 2016, §20.

¹⁰ CJEU (Grand Chamber), *Dominguez v Centre Informatique du Centre Ouest Atlantique*, C-282/10, 24 November 2012 (cf. AG Trstenjak §§71-88).

¹¹ See AG Mengozzi in *Fenoll v Centre d'aide par le travail*, C-316/13, 12 June 2014, §§59-61.

¹² *Schultz-Hoff*, *ibid*, §43.

¹³ *Kreuziger* §§48-9, 52, 55; *Shimizu* §§41-2, 45, 48.

¹⁴ *Kreuziger*, §§52-4; *Shimizu* §§45-47.

¹⁵ *Bauer*, §§38-50.

failure to ensure the effectiveness of the entitlement.¹⁶ Once again, the judgment in *Bauer* is based on the language of fundamental social rights, emphasised by the support the CJEU drew from the unqualified terms of Article 31 of the Charter, with the health and safety objectives of the Directive given little prominence.

This approach fed into the second, important aspect of *Bauer*, concerned with the Charter and its effect on domestic law. The husband of Mrs Broßon, one of the widows, was employed by a private sector employer. The referring court stated expressly that any interpretation by which the right to a payment in lieu passed to a deceased worker's estate would be *contra legem* and hence exceeded the limits of the duty owed by domestic courts to interpret national law in accordance with the Directive.¹⁷ Undeterred, and emphasising the need to ensure the effectiveness of fundamental social rights, AG Bot considered that the right to paid annual leave in Article 31 of the Charter possessed all the necessary qualities for it to be relied on directly in disputes between private individuals.¹⁸ According to AG Bot, the Directive and Charter mutually reinforce each other because the case-law on the Directive fed into the normative content of Article 31.¹⁹

The CJEU's judgment similarly displays how a positive feedback mechanism can operate among related rights' instruments. First, the CJEU held that the meaning of 'paid annual leave' in the Directive and Article 31 of the Charter was identical, with each reinforcing the other.²⁰ Thus, the strict conditions under which rights in the Charter can be limited²¹ fed into Article 7 of the Directive, the substantive content of which in turn informed the Charter.²² Second, it held that the right to annual leave was not established by the Directive but, rather, was an 'essential principle of EU social law' based on earlier instruments such as the Community Charter of Fundamental Social Rights of Workers, the European Social Charter and ILO Convention No. 132.²³ That essential principle was then reflected, affirmed and strengthened by the mandatory terms of Article 31 of the Charter.²⁴ The upshot was that Article 31 was itself a sufficient basis for conferring individual legal rights on every worker, so that a national court was required to disapply national legislation inconsistent with the full effectiveness of that right.²⁵ As if that were not enough, the Grand Chamber repeated pretty much the same language in *Shimizu*.²⁶

Implications and Conclusions

¹⁶ *Bauer*, §§49-50.

¹⁷ *Bauer*, §15.

¹⁸ AG Bot, *Bauer*, §§79-85.

¹⁹ *Ibid*, §§86-91.

²⁰ *Bauer*, §§57-61.

²¹ Charter, Article 52(1).

²² *Bauer*, §57-59.

²³ *Ibid*, §§80-83.

²⁴ *Ibid*, §§84-85.

²⁵ *Ibid*, §§86-91.

²⁶ *Shimizu*, §§62-80.

At least two significant implications can be drawn from *Bauer*, *Kreuziger* and *Shimizu*. The first is that the right to annual leave is now expressly conceived as a fundamental social right grounded in international human rights instruments. The various sources of the right combine synergistically to enhance the protection of workers. They include the European Social Charter which AG Bot saw as an important factor supporting the direct effect of Article 31.²⁷ The result is a powerful right of wide scope which cannot be derogated from either under the Directive itself nor under the Charter, save in accordance with the strict conditions of Article 52(1). The recognition in *Kreuziger* and *Shimizu* that workers should not automatically lose the right simply because they did not apply to take leave reflects the enhanced status of the fundamental right, loosened from any detrimental effect on a worker's health and safety.

The second matter, connected to the first, is how the Charter will contribute to the enforcement of social rights. The early signs in *AMS* were that the solidarity provisions of the Charter would add little independent weight to the substantive provisions in social Directives.²⁸ As a result of *Bauer* and *Shimizu* the Charter now supplements or even supplants social Directives, at least as regards those provisions framed in mandatory and unconditional terms. AG Pitruzella has already indicated that the effect of *Bauer* and *Shimizu* is equally applicable to other working time rights in Article 31;²⁹ the same logic should apply to other unconditional provisions in Chapter IV. When combined with the right to an effective remedy in Article 47 of the Charter, itself used as an independent basis for overriding national limitations on remedies for infringement of working time rights,³⁰ the reinvigorated Charter provides a powerful boost to individual judicial protection and the systemic delivery of the fundamental rights. In common with protection against discrimination, at EU level working time rights are now horizontally effective fundamental social rights, increasingly anchored not in the Directive itself but in international human rights norms.

²⁷ AG Bot, *Bauer*, §94.

²⁸ CJEU, *Association de Médiation Sociale v Union Locale des Syndicats CGT* (Grand Chamber), C-176/12, 12 January 2014.

²⁹ *Federación de Servicios de Comisiones Obreras v Deutsche Bank*, C-55/18, 31 January 2019, §§94-97.

³⁰ CJEU (Fifth Chamber), *King v Sash Window Workshop*, C-214/16, 29 November 2019.

